Filed 12/12/01

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

UNIVERSAL HARDWOOD FLOORING AND MOULDING, INC. Plaintiff, v. ZACHARIS AND ALMA VORGIAS, Defendants, Cross-complainants and Respondents; TONY GOLDSTEIN, Defendant, Cross-defendant and Appellant.	B143767 (Los Angeles County Super. Ct. No. EC025606)

APPEAL from an order of the Superior Court of the County of Los Angeles, David M. Schacter, Judge. Affirmed in part, and reversed in part.

Law Offices of Mark E. Goodfriend, Mark E. Goodfriend for Defendant, Cross-Defendant and Appellant.

Marcello M. Di Mauro for Defendants, Cross-Complainants and Respondents.

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SUMMARY

In this case we hold: (1) a trial court did not abuse its discretion by denying a motion to vacate a default judgment where the moving party failed to demonstrate the existence of the statutory grounds which provided for such relief; (2) the trial court also did not err in awarding attorney's fees where the party seeking such fees presented substantial evidence to support the award, and (3) a judgment awarding treble damages for violation of the Unfair Practices Act (Business and Professions Code section 17000-17101) was improper where the party to whom such damages were awarded failed to allege the anti-competitive practices prohibited by that act.

PROCEDURAL AND FACTUAL BACKGROUND

Respondents Zacharis and Alma Vorgias hired appellant Tony Goldstein, an individual doing business as M&A Goldstein Flooring to install some hardwood flooring in their home in May 1998. Goldstein completed the work in June 1998, for which Vorgias paid him an agreed price of $10,845. However, Goldstein failed to pay his supplier, Universal Hardwood Flooring and Moulding, Inc. for materials he purchased to complete the Vorgias job. Universal filed this action against Goldstein to recover the sums due. Universal, which is not a party to this appeal, also named Vorgias as a defendant in this action, and recorded a mechanic's lien against Vorgias' home. Universal sought and obtained entry of a default judgment against Goldstein on the complaint on May 5, 1999. A default prove-up was held in June 1999, and a judgment for approximately $12,600 was entered against Goldstein June 21, 1999.

In June 1999, Vorgias filed a cross-complaint against Goldstein and alleged nine causes of action for: (1) breach of written construction contract; (2) breach of the covenant of good faith and fair dealing; (3) civil diversion of construction funds; (4) failure to pay construction money; (5) criminal diversion of construction funds; (6) wrongful conversion of money; (7) fraudulent business practices; (8) unfair trade practices; and (9) a

claim against contractor's license bond. Vorgias sought compensatory, punitive and treble statutory damages, plus restitution, injunctive relief and attorney's fees.

On October 21, 1999, Vorgias sought and obtained entry of Goldstein's default on the cross-complaint. Vorgias' request for entry of default was accompanied by a process server's declarations stating the server had been unable to effect personal service on Goldstein, but had effected substitute service on Goldstein at his business address by leaving copies of the summons and cross-complaint with the manager in charge, and subsequently mailing copies of those documents to Goldstein's home and business addresses. (Code Civ. Proc., § 415.20, subds. (a), (b).)

On December 21, 1999, Goldstein filed a motion to vacate the entry of the defaults on the complaint and cross-complaint (Code Civ. Proc., § 473) based on mistake, inadvertence, surprise or excusable neglect (Code Civ. Proc., § 473.5) and lack of notice (Code Civ. Proc., § 473.5). The motion was accompanied by Goldstein's declaration which stated, in pertinent part:

> "To the best of my knowledge, at no time have I ever been served with the summons and complaint or the summons and cross-complaint in this case. If I was validly served, I did not understand the papers (my ability to read English is limited), I misplaced the papers and was not aware I was required to respond. In fact, I did not even become aware of this case until I received a copy of the Order to Appear for Examination in or about October or November 1999 which set a judgment debtor exam for me to appear at on November 30, 1999, and as a result of which I consulted counsel in November 1999. At no time did I avoid or attempt to avoid service of process."

In his opposition Vorgias argued Goldstein had failed to demonstrate an entitlement to relief under Code of Civil Procedure sections 473 or 473.5.

The trial court denied Goldstein's motion after it found that, "since there is no attorney declaration of falt [sic] the moving pary [sic] would need to show mistake,

inadvertence, surprise or excusable neglect; none was shown by [Goldstein's] declaration. [Goldstein's] declaration states he may not have been served [with the summons and cross-complaint], and if he was served he didn't understand them, and if he was served and understood them - he misplaced them."

A default prove-up hearing was held February 1, 2000, after which the trial court entered judgment against Goldstein on the cross-complaint in the amount of $27,284. The judgment includes a punitive damage award of $10,845, and an award of $4,000 for attorney's fees.

Goldstein appeals from the judgment.

DISCUSSION

Goldstein contends the trial court erred in: (1) refusing to vacate the default judgment against him; (2) awarding statutory treble damages; (3) awarding $4,000 in attorney's fees; and (4) awarding punitive damages.[1] Vorgias concedes the merits of Goldstein's argument with respect to the issue of punitive damages, and that matter is no longer at issue.

1. The trial court did not abuse its discretion by refusing to set aside the default.

A court may relieve a party from a default or a default judgment taken against it as a result of its "mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Proc., § 473, subd. (b).) In a case such as this, in which the application for relief is not accompanied by an attorney's affidavit of fault, the motion is "addressed to the sound

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[1] Goldstein also asserts the amounts for the remaining damages awarded against him were either improper or not based on substantial evidence. However, he fails to support this contention with any citations to the record, argument or legal authority. Accordingly, we deem this argument waived on appeal. (*Kensington University v. Council for Private Postsecondary etc. Education* (1997) 54 Cal.App.4th 27, 42-43 [Contentions supported neither by argument nor citation of authority may be deemed to be without foundation and abandoned.]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 [It is appellant's burden to show reversible error by an adequate record].)

discretion of the trial court and an appellate court will not interfere unless there is a clear showing of an abuse." (*Davis v. Thayer* (1980) 113 Cal.App.3d 892, 904; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) In an appeal challenging a discretionary trial court ruling, it is appellant's burden to establish an abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311.)

In addition, if an appeal involves a factual dispute, the trial court's resolution of disputed factual issues will be affirmed if supported by substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [When a factual finding is attacked as lacking substantial evidence to sustain it, the appellate court's power begins and ends with a determination as to whether, on the entire record, there is substantial evidence, contradicted or not, which supports the determination.].)

Moreover, to justify relief from default under Code of Civil Procedure section 473, subdivision (b), the claimed mistake, inadvertence, or neglect must be reasonable. (*Conway v. Municipal Court* (1980) 107 Cal.App.3d 1009, 1017.) However, because the law favors a resolution on the merits, the showing required to justify setting aside a default or default judgment is minimal. (*Shamblin, supra,* 44 Cal.3d at p. 478; *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) Goldstein has failed to satisfy even this minimal burden.

Recognizing the established principle that "only *very slight* evidence will be required to justify . . . setting aside a default" (*Elston, supra,* 38 Cal.3d at p. 233), Goldstein told the trial court "there are compelling legal reasons why the default[] must be set aside." However, apart from asserting he should be permitted his "day in court," Goldstein neglected to identify a single "compelling" reason to justify the request to set aside the default. On the contrary, the only evidence offered to support his motion was Goldstein's contradictory representations that he did not know about the action against him because he was "never served with the summons and complaint or . . . cross-complaint," and

if he "was validly served, [he] did not understand the papers" or "misplaced [them] and was not aware [he] was required to respond." Goldstein made no effort to demonstrate that his mistake, inadvertence or neglect was even remotely reasonable. The trial court clearly believed Goldstein's claims were not credible. On this record, we conclude the court did not abuse its discretion in denying the requested relief.[2]

2. The trial court erred in awarding treble damages.

Goldstein also contends the trial court's award of treble damages was erroneous because Vorgias failed to plead a cause of action under the Unfair Practices Act. (Bus. & Prof. Code, §§ 17000-17101.) We agree. The Unfair Practices Act, a derivation of antitrust law, is regarded as the California version of the federal Robinson-Patman Act. Goldstein correctly contends that the Unfair Practices Act regulates such anti-competitive practices as secret rebates, below-cost selling, locality discrimination, and the like.

None of these anti-competitive practices are alleged in this action. Vorgias, who failed to address this argument in his brief, merely insists the treble damages award be affirmed. It cannot be. The award for treble damages made under Business and Professions Code section 17082, which is unsupported by either an adequate pleading or any evidence in the record, must be reversed.

3. Attorney's fees were properly awarded.

Goldstein's final contention of error is that the trial court's award of $4,000 in attorney's fees lacks substantial evidentiary support. He does not contend the fee award

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[2] Goldstein also argues he was entitled to relief based on Code of Civil Procedure section 473.5, which permits the trial court to set aside the default of a party who has not received actual notice of an action. However, Goldstein failed to make this argument below. He may not do so for the first time on appeal. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 480, 1488, fn. 3 [Issues not raised in the trial court will ordinarily not be considered on appeal.]; *Western Oil & Gas Assn v. Monterey Bay United Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 427, fn. 20 [A party may not change its theory of relief on appeal].) In any event, Goldstein's contention is belied by his declaration in which he admits, at least in part, that he received service in this action.

lacks a legal basis. Rather, he asserts only that the amount awarded is incorrect. He insists the request for an award of fees is "unsupported by the usual delineation of hours and services, and the only evidence in the record of legal services rendered is the filing of a one-and-a-half page demurrer that was never heard [] and the negotiation of a $500 settlement which might well have taken but a few minutes []." Goldstein is mistaken.

The record contains adequate evidentiary support for the attorney's fees award. In opposition to Goldstein's motion to vacate the default, Vorgias submitted a December 30, 1999 declaration from his attorney which states, in addition to "the substantial legal time [spent] in preparing [Vorgias's] opposition," Vorgias had already incurred $450 in costs and attorney's fees in obtaining Goldstein's default.

At the default prove-up hearing, Vorgias also submitted an accounting which reflected that, by February 2000, he had incurred $2,500 in legal fees to defend Universal's action to foreclose the mechanic's lien due to Goldstein's failure to pay his supplier. The accounting also stated Vorgias incurred attorney's fees of $1,500 under both the attorney fee provision of the contract and the Unfair Practices Act (Bus. & Prof. Code § 17082), prosecuting the cross-complaint. That accounting was admitted in evidence. At the default prove-up hearing, Vorgias also testified in support of the accounting, and said his contract with Goldstein contained an attorney's fee provision. (The Estimate & Contract is attached to the cross-complaint.) Accordingly, the judgment included an award of $4,000 for attorney's fees ($2,500 as part of Vorgias's $3,471 compensatory damages to defend Universal's action, and $1,500 in contractual and statutory attorney fees).[3] That award enjoys substantial evidentiary support in the record, and Goldstein has failed to demonstrate otherwise. Accordingly, that portion of the judgment is affirmed.

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[3] Although we have concluded Vorgias's recovery on the Unfair Practices Act claim cannot stand, the attorney's fee award survives due to its independent contractual basis.

DISPOSITION

The portion of the judgment awarding Vorgias $13,413 for Goldstein's violation of the Unfair Practices Act (Bus. & Prof. Code, § 17082), and $10,845 in punitive damages is reversed. In all other respects, the judgment is affirmed. The cause is remanded to the trial court for additional proceedings consistent with the views expressed herein. Vorgias is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BOLAND, J.*

We concur:

LILLIE, P.J.

JOHNSON, J.